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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

JEHAN ZEB MIR,

Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent;

MEDICAL BOARD OF CALIFORNIA,

Real Party in Interest.

C061570

(Super. Ct. No.
7CS00036)

The Medical Board of California (Board) is required under the Administrative Procedures Act (Gov. Code, § 11340 et seq.; APA) to allow oral or written argument when it rejects a decision of an administrative law judge (ALJ) and decides a case on its own, even where the case is remanded to the Board for redetermination of the penalty following judicial review on a petition for writ of administrative mandamus. (*Ventimiglia v.*

Board of Behavioral Sciences (2008) 168 Cal.App.4th 296, 313-314.)

The Board initially revoked petitioner Jehan Zeb Mir's license upon the adoption of the findings of an ALJ. The superior court granted a petition to set aside the revocation on the ground that some of the Board's findings could not be sustained. It remanded the matter to the Board stating that it could not determine whether the Board would have applied the same penalty without the disapproved findings.

The Board issued a new decision, again revoking his license after deleting or recasting the findings but denied petitioner's request for a new hearing. Petitioner then filed a motion in the superior court to set aside and vacate the penalty. The court denied the motion finding that petitioner's challenges to the factual findings underlying the Board's decision were "amply considered" in the trial court's rulings. Petitioner sought a new trial arguing that he was denied "a hearing on penalty determination" (Code Civ. Proc., § 1097.) The request was denied.

Petitioner then sought the instant writ of mandate directing the superior court to vacate its order discharging a peremptory writ of administrative mandate and to grant his petition for writ of administrative mandate in full, and reinstate his medical license.¹ We agree petitioner's motion to

¹ Petitioner is a vexatious litigant and is subject to a prefiling order. (Code Civ. Proc., § 391.7.) On April 22,

set aside and vacate the Board's decision on remand should have been granted on the ground that the Board violated the command of Government Code section 11517, subdivision (c)(2)(E)(ii), that the Board must, in these circumstances, afford "the parties the opportunity to present either oral or written argument before the agency itself."

We shall issue a writ of mandate directing the superior court to (1) vacate its order discharging the peremptory writ of administrative mandate and (2) issue a new peremptory writ directing the Board to set aside its decision revoking petitioner's license and remanding the matter to redetermine the penalty with directions to allow oral or written argument.

In light of our decision, we shall not reach petitioner's additional contentions concerning the Board's alleged failure to comply with the writ of administrative mandate. Moreover, we decline to consider his remaining contentions that either were raised or could have been raised in his prior petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner had practiced as a licensed physician and surgeon since 1972.² On June 8, 2000, G.F., an 81-year-old resident of a board and care facility, was brought to San

2009, we granted his application for an order permitting him to file the instant petition for writ of mandate.

² Certain background facts are taken from the Board's Corrected Decision on Remand issued June 13, 2008. These facts are consistent with those in the instant petition for writ of mandate.

Antonio Community Hospital. She had a cool right foot and was unable to walk. Petitioner diagnosed her with thromboembolism, ordered that she be transferred to Pomona Valley Hospital, and performed a thromboembolectomy on her later that day. On June 10, 2000, petitioner diagnosed G.F. with recurrent thromboembolism and performed a second surgery. On June 12, 2000, petitioner again diagnosed G.F. with thromboembolism and performed a third surgery. On June 14, 2000, petitioner amputated G.F.'s right leg above the knee.

On July 16, 2003, complainant Ron Joseph, Executive Director, Division of Medical Quality, Medical Board of California, Department of Consumer Affairs, filed an accusation alleging petitioner was subject to disciplinary action for unprofessional conduct based on his care and treatment of G.F. in June 2000.³ (Bus. & Prof. Code, §§ 2227, 2230, 2230.5, subd. (c), 2234, 2261, 2266.)

On March 3, 2006, the ALJ issued a proposed decision recommending revocation of petitioner's medical license. Among other things, the ALJ found petitioner (1) unreasonably delayed G.F.'s surgery by ordering she be transferred to another hospital; (2) made false statements regarding the reason for the transfer; (3) misdiagnosed G.F.'s medical condition on June 8, 2000, and therefore performed the wrong surgery; (4) failed to order an intra-operative or post-operative angiogram to

³ A first amended accusation was filed on November 8, 2004, and a second amended accusation was filed on April 6, 2005.

determine the efficacy of the surgical procedure he performed on June 8, 2000; (5) misdiagnosed G.F. on June 10, 2000, and therefore performed the wrong surgery; (6) failed to adequately document the services he provided to G.F. between June 8 and 14, 2000; and (7) falsely stated that (a) the proctor would not allow him to do a femoral-popliteal bypass procedure on June 10, 2000, and (b) G.F.'s leg was viable on June 12, 2000, and there was no gangrene or rigor mortis.

The ALJ concluded that cause existed to discipline petitioner for unprofessional conduct because he engaged in acts of gross negligence, engaged in repeated acts of negligence, acted incompetently, failed to adequately document the services he provided, and knowingly made false statements. (Bus. & Prof. Code, §§ 2227, 2234, subds. (b)-(e), 2266.) The ALJ further concluded that "it would be contrary to the public interest to allow [him] to maintain his license to practice medicine at this time." In doing so, the ALJ explained: "Complainant established that [petitioner's] care and treatment of [G.F.] was below the standard of care and that he did not adequately or accurately document the services that he provided [G.F.]; further, in response to the charges against him, [petitioner] intentionally made false statements during his Medical Board interview and in the administrative hearing. He offered no evidence of mitigation or rehabilitation. There is no evidence that he has taken action to cure his deficiencies in medical practice and that he is otherwise an honest person. Given the foregoing, there are no conditions that can be imposed to assure

protection of the public if [petitioner] is allowed to maintain his license to practice medicine in the State of California at this time."

The Board modified the proposed decision to delete a cost recovery provision and adopted the decision as modified on May 17, 2006. Thereafter, the Board reconsidered its decision and modified it to include the following language: "Good cause having been shown, [petitioner] may petition the Division of Medical Quality for reinstatement not less than two years after the effective date of this decision."

In January 2007, petitioner filed a petition for writ of administrative mandate challenging the Board's revocation of his medical license.⁴ (Code Civ. Proc., § 1094.5.) On August 10, 2007, the superior court granted in part and denied in part the petition. The court sustained all of the Board's findings, except for the following: (1) petitioner unreasonably delayed treatment by transferring G.F. to another hospital; (2) petitioner intentionally made false statements of fact concerning the reason for the transfer; (3) petitioner made false statements of fact concerning the condition of G.F.'s leg on June 12, 2000; and (4) the "AUTHORIZATION FOR AND CONSENT TO SURGERY OR SPECIAL DIAGNOSTIC OR THERAPEUTIC PROCEDURES" form was signed by G.F.'s daughter but not petitioner. The court was

⁴ The petition for writ of administrative mandate was initially assigned to Judge Ohanesian. On August 11, 2008, the matter was transferred to Judge Kenny for all purposes.

"unable to determine that [the Board] would have made the same decision and imposed the same penalty without those findings." Accordingly, it issued a peremptory writ of mandate directing the Board to set aside its decision revoking petitioner's license and remanding the matter to redetermine the penalty.

On March 18, 2008, petitioner filed a petition for writ of mandate in this court. (*Mir v. Sacramento Superior Court*, Case No. C058393).⁵ By order dated April 24, 2008, we summarily denied the petition.

On remand, the Board issued a new decision in which it either deleted those findings that the superior court determined were not supported by the evidence or recast them as findings of the ALJ, noting the superior court's ruling.⁶ For example, paragraph 22 of the ALJ's original proposed decision reads: "Given the facts set forth in Findings 8, 9, 10, 19, 20, and 21, by ordering transfer to [Pomona Valley Hospital], [petitioner] caused an unreasonable delay in the surgery of [G.F.]. Expert testimony established that the foregoing conduct constitutes an

⁵ Petitioner asks us to take judicial notice of the exhibits filed in support of his petition for writ of mandate. We grant the request. (Evid. Code, § 452, subd. (d).) We shall also take judicial notice of the petition itself on our own motion. (*Ibid.*)

⁶ The Board issued its initial decision on remand on May 28, 2008. Complainant filed an application to modify the decision to correct mistakes contained therein. (Gov. Code, § 11518.5, subd. (a).) The Board granted the application and issued a corrected decision on June 13, 2008. We shall refer to the corrected decision as the decision on remand.

extreme departure from the standard of care." That same paragraph in the Board's decision on remand reads: "The Administrative Law Judge found that, given the facts set forth in Findings 8, 9, 10, 19, 20, and 21, by ordering transfer to [Pomona Valley Hospital], [petitioner] caused an unreasonable delay in the surgery of [G.F.] and expert testimony established that the foregoing conduct constitutes an extreme departure from the standard of care. However, the Superior Court determined that the weight of the evidence does not support a finding that [petitioner], by transferring [G.F.] to Pomona Valley Hospital, unreasonably delayed her treatment." In addition, Paragraph 22 was omitted as a basis for four of the Board's 11 legal conclusions in its decision on remand.

Petitioner filed a request for reconsideration of the Board's decision on remand. The Board denied the request, and on July 10, 2008, filed its return to the peremptory writ of administrative mandate.

Petitioner then filed a motion in the superior court to set aside and vacate the penalty. (Code of Civ. Proc., § 1097.)⁷ The court denied the motion, finding petitioner's challenges to

⁷ Code of Civil Procedure section 1097 provides in pertinent part: "When a peremptory mandate has been issued and directed to any . . . board . . . , if it appear to the court that any member of such . . . board . . . has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court . . . may make any orders necessary and proper for the complete enforcement of the writ."

the factual findings underlying the Board's decision to revoke his license were "amply considered and ruled on in the writ petition and unsuccessfully challenged in the Court of Appeal. Such matters have been finally decided . . . and this Court will not disturb those rulings." With respect to the penalty imposed, the court observed that "[w]here reasonable minds [can] differ over the penalty's appropriateness, no manifest abuse of discretion is shown." The court also found that petitioner failed to establish the penalty was the result of ethnic or racial discrimination.

Thereafter, petitioner moved for a new trial on his motion to set aside and vacate the penalty, arguing inter alia that he was "denied due process upon remand" insofar as he was denied "a hearing on penalty determination" After the motion was fully briefed, the Board notified the superior court of the court of appeal's recent decision in *Ventimiglia v. Board of Behavioral Sciences*, *supra*, 168 Cal.App.4th at pages 303, 314 (*Ventimiglia*), which held that, under the circumstances of that case, Government Code section 11517, subdivision (c)(2)(E)(ii), "require[s] that a licensee be given an opportunity to present oral or written argument to the Board when a court has granted an administrative writ of mandate and remanded the matter to the Board for reconsideration of penalty" The Board asserted *Ventimiglia* was distinguishable, and thus, did not apply to petitioner's case. Petitioner argued that it did apply, and that the Board abused its discretion in failing to provide him with an opportunity to present argument on remand.

The superior court agreed with the Board, and denied the motion for new trial. The court ruled that "[t]he Board's actions on remand were not contrary to the principles announced in *Ventimiglia*. Unlike *Ventimiglia*, the Board made no additional factual findings to support its penalty determination following remand. Rather, the Board simply clarified its decision by noting those findings which the Court had found were not supported by the weight of the evidence. As those changes were mere clarifying changes under Government Code [section] 11517[, subdivision] (c)(2)(C), the Board was not required to receive oral or written argument before issuing the corrected decision on remand."

On March 4, 2009, the superior court discharged the peremptory writ issued in April 2008. Petitioner then filed the instant petition for writ of mandate asking us "to set aside and vacate the superior court's judgment and direct the superior court to grant petition for writ of mandate . . . [and] reinstate [his] medical license" We issued an alternative writ of mandate, directing that "[a]ny opposition shall specifically address (but is not limited to addressing) petitioner's claim that the Medical Board's action on reconsideration of discipline in this case was contrary to the decision in *Ventimiglia*"

DISCUSSION

I

Petitioner contends the Board failed to proceed in the manner required by law, a ground for relief under Code of Civil

Procedure section 1094.5, when it failed to allow written or oral argument before redetermining the penalty on remand. We agree.

All proceedings against a licensee for unprofessional conduct must be held in accordance with the APA. (Bus. & Prof. Code, § 2230.) Under the APA, a proceeding to revoke, suspend, or limit a license is initiated by the filing and serving of an accusation. (Gov. Code, §§ 11503, 11505.) If the licensee files a notice of defense, the matter becomes a contested case, and a hearing on the merits is conducted before an ALJ. (*Id.*, §§ 11502, 11506, subd. (c), 11512.) When, as here, an ALJ hears a contested case alone, he or she must deliver a proposed decision to the relevant agency, here the Board. (*Id.*, § 11517, subd. (c).) If the Board fails to act within 100 days of receipt of the proposed decision, the proposed decision is deemed adopted by the agency. (*Id.*, § 11517, subd. (c)(2).) Alternatively, the Board may: (1) adopt the proposed decision in its entirety; (2) reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision; (3) make technical or other minor changes in the proposed decision and adopt it as the decision; (4) reject the proposed decision and refer the case to the same ALJ if reasonably available; or (5) “[r]eject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence.” (*Id.*, § 11517, subd. (c)(2)(A)-(E).) Where the Board opts to decide the case itself, it must afford “the parties the opportunity to

present either oral or written argument before the agency itself” (*Id.*, § 11517, subd. (c)(2)(E)(ii).) The procedural safeguards codified in Government Code section 11517 apply on remand following judicial review by petition for writ of administrative mandate. (*Ventimiglia, supra*, 168 Cal.App.4th at pp. 313-314.)

Petitioner claims that because the Board itself redetermined the penalty on remand, it was required to allow oral or written argument. The Board responds that it “never rejected the administrative law judge’s proposed decision,” but rather “only made clarifying changes,” and thus, was not required to allow argument. As the parties acknowledge, *Ventimiglia* is instructive.

Ventimiglia involved a marriage and family therapist whose license was revoked because he had sexual contact with a client. (168 Cal.App.4th at p. 299.) The therapist brought a petition for writ of administrative mandate, arguing the Board of Behavioral Sciences failed to recognize or exercise its discretion to impose a lesser penalty. (*Id.* at p. 300.) The superior court agreed, finding “‘the Board’s decision to revoke [the therapist’s] license was based on the erroneous [assumption] . . . that it had no discretion other than to revoke the license.’” (*Id.* at pp. 300-301.) Accordingly, the court issued a peremptory writ of mandate directing the Board of Behavioral Sciences to set aside its decision revoking the therapist’s license and remanding the matter to the Board to

redetermine the penalty imposed in light of the court's decision. (*Id.* at p. 301.)

On remand, the Board of Behavioral Sciences issued a new decision with findings of fact and conclusions of law, which were at odds with the original proposed decision of the ALJ. (*Ventimiglia, supra*, 168 Cal.App.4th at p. 307.) "[T]he administrative law judge found [the therapist] had presented substantial evidence of the circumstances surrounding the sexual relationship with [the client] and his rehabilitation. The proposed decision stated: 'The evidence was impressive, credible, and of such significance that, but for the law which mandates revocation of his license, might otherwise have led to a disciplinary order less stringent than that set forth below.' The administrative law judge noted that it was not necessary to detail evidence of [the therapist's] efforts at rehabilitation since (as he understood the law) revocation of his license was mandatory. [¶] Contrary to this finding by the administrative law judge, on remand, the Board issued a 15-page decision with detailed new factual findings and conclusions of law. In contrast, the proposed decision by the administrative law judge was just four pages long. The Board concluded: 'The nature and severity of [the therapist's] acts speak for [themselves]. Having sexual relations with a patient is one of the most severe offenses a Marriage and Family Therapist can commit. In addition, [the therapist] did so under circumstances that aggravated rather than mitigated the nature of this offense. He engaged in sexual relations with a patient he knew to be a

borderline unstable individual. He did not just do so one or two times as a result of a "moment of weakness," but continually and systematically over a 16 month period. Even at the end, he was operating under the assumption he could still "cure" the patient with continued therapy.' . . . The Board concluded that [the therapist's] efforts at rehabilitation had been 'minimal and clearly do not justify his being permitted to practice as a Marriage and Family Therapist even under limited or restricted conditions.'" (*Id.* at p. 307.)

The court of appeal found that "[t]he Board's new findings . . . went far beyond the clarifying modifications allowed under [Government Code] section 11517, subdivision (c)(2)(C)," and "[t]he new language in the Board's decision affected the factual and legal basis of the proposed decision" (*Ventimiglia, supra*, 168 Cal.App.4th at p. 307.) The court rejected the Board of Behavioral Science's argument that it neither adopted nor rejected the ALJ's proposed decision, but instead merely complied with the language of the writ of mandate. (*Id.* at p. 313.) The court explained: "The legislative history of [Government Code] section 11517 demonstrates that from its origin in 1945, the Legislature provided that an agency may not reject a proposed decision of the administrative law judge and decide the case on its own unless the parties are given an opportunity to present argument to the agency orally or in writing. There is nothing in the APA that creates an exception to this important procedural safeguard when a case is remanded

for a new decision following judicial review on a petition for writ of administrative mandamus." (*Id.* at p. 313.)

While the modifications in this case were not as extensive as those in *Ventimiglia*, we reject the Board's characterization of the modifications as nothing more than "clarifying changes." As we shall explain, the changes affected the factual and legal basis for the proposed decision, and thus, the Board erred in not allowing argument.

By recasting those findings the superior court ruled were not supported by the evidence as those of the ALJ and noting the superior court's ruling, the Board effectively omitted findings from the ALJ's original proposed decision. Government Code section 11517, subdivision (c)(2)(C), which allows the Board to "[m]ake technical or other minor changes in the proposed decision" without allowing for argument, expressly declares that such a change "is limited to a clarifying change or a change of a similar nature *that does not affect the factual or legal basis of the proposed decision.*" (*Italics added.*)

In concluding petitioner should not be allowed to maintain his medical license, the ALJ noted that petitioner's care and treatment of G.F. fell below the standard of care. The proposed decision included a finding that petitioner unreasonably delayed G.F.'s surgery by ordering that she be transferred to another hospital. That finding was also cited as the basis for several of the legal conclusions set forth in the proposed decision. Thus, the omission of that finding necessarily affected both the factual and legal basis for the proposed decision.

Moreover, as the court observed in *Ventimiglia*, the legislative history of Government Code section 11517 makes plain that where the Board decides a case itself, it must allow for argument. (168 Cal.App.4th at pp. 308-313.) Here, on remand, the Board was directed to decide the penalty. Thus, petitioner should have been given an opportunity to present argument. He was not. Accordingly, his motion to set aside and vacate the Board's decision on remand should have been granted on this ground. We shall issue a writ of mandate directing the superior court to (1) vacate its order discharging the peremptory writ of administrative mandate and (2) issue a new peremptory writ of mandate directing the Board to set aside its decision revoking petitioner's license and remanding the matter to redetermine the penalty with directions to allow oral or written argument. In light of this conclusion, we do not reach petitioner's additional contentions concerning the Board's alleged failure to comply with the writ of administrative mandate. We do note, however, that remand is limited to a redetermination of the penalty in light of the superior court's ruling.

II

Petitioner's remaining contentions are directed at the initial proceedings before the ALJ and the Board, not those on remand. Petitioner contends the Board abused its discretion in (1) making findings on additional charges that were added at the hearing, (2) considering the testimony of a rebuttal witness concerning matters that were beyond the scope of petitioner's cross-examination, (3) ignoring admissions by its own experts

that were dispositive of the charge that petitioner misdiagnosed G.F., and (4) failing to make credibility findings as required under Government Code section 11425.50, subdivision (b). The first three contentions were raised in petitioner's first petition for writ of mandate, which was denied without opinion on April 24, 2008.⁸ Petitioner has not set forth any unusual or changed circumstances that warrant reconsideration of that earlier decision. Accordingly, we decline to revisit those issues here. (See *Hagan v. Superior Court* (1962) 57 Cal.2d 767, 770-771 ["[A] court, in the absence of unusual or changed circumstances, . . . is justified, in its discretion, in refusing to consider repetitive applications of the same petition."]). Petitioner's fourth contention -- that the Board prejudicially erred in failing to make credibility findings under Government Code section 11425.50, subdivision (b) -- could have been, but was not raised in his first petition for writ of mandate. Even assuming the contention is properly before us, it lacks merit.

Petitioner asserts that "[b]y failing to comply with the Government Code [section] 11425.50[, subdivision] (b) the Board abused [its] discretion by not proceeding in the manner required by law. *This breach in and [of] itself was prejudicial because the court applied '[the] strong presumption of correctness' to*

⁸ Where, as here, a writ petition is the only authorized mode of review, "a summary denial of the petition is necessarily on the merits." (*Leone v. Medical Board of California* (2000) 22 Cal.4th 660, 664, 670; see also Bus. & Prof. Code, § 2337.)

the '*Board's Decision.*'" (Italics added.) Petitioner is correct that a hearing officer's determination of credibility is not entitled to great weight if he or she fails to identify any evidence of demeanor, manner or attitude supporting his or her conclusion. (Gov. Code, § 11425.50, subd. (b); *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 430.)⁹ Here, however, the superior court concluded that "[t]he credibility determinations in this case [were] not supported by such observations," and thus, were not entitled to great weight. (Italics added.) Accordingly, petitioner was not prejudiced by the alleged error.

DISPOSITION

Let a peremptory writ of mandate issue, directing respondent superior court to (1) vacate its order discharging the peremptory writ of administrative mandate, and (2) issue a new peremptory writ of administrative mandate directing the Board to set aside its decision revoking petitioner's license and remanding the matter to redetermine the penalty with

⁹ Government Code section 11425.50, subdivision (a) requires that adjudicative decisions by administrative agencies be in writing and include a statement of the factual and legal basis for the decision. Subdivision (b) of that section provides in pertinent part: "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it."

directions to allow oral or written argument in accordance with Government Code section 11517, subdivision (c)(2)(E)(ii). The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.493, subd. (a)(1)(B).)

BLEASE, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.